No. 17-801

IN THE

Supreme Court of the United States

IN RE UNITED STATES, et al.,

Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE GOVERNOR OF COLORADO, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF MANDAMUS

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The States of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the Governor of Colorado, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in support of respondents, in opposition to the petition for mandamus without ten days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give ten days' notice. All parties have consented to the filing of the brief without such notice.

As set forth in the enclosed brief, the undersigned amici States have a strong interest in the outcome of this mandamus proceeding. First, as frequent plaintiffs in suits brought pursuant to the Administrative Procedure Act (APA), amici States have an interest in preserving meaningful judicial review of agency action. APA suits are a crucial tool by which States—including amici States—regularly hold federal agencies accountable to acting lawfully and rationally on issues of substantial public import. Second, amici States are also litigating a parallel challenge in the Eastern District of New York to petitioners' termination of the program known as "Deferred Action for Childhood Arrivals" (DACA).[1] In that matter, petitioners have attempted to rely on the same meager administrative record as produced in

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[1] *See* States' First Am. Compl., *State of New York v. Trump*, No. 17-cv-5228 (E.D.N.Y.), ECF Nos. 54 & 55.

this case,[2] and have argued, as here, that a court lacks the power to compel completion of the record or production of a privilege log.[3] Thus, the ruling here may significantly impact amici States' ability to obtain meaningful judicial review in their own challenge to petitioners' conduct in terminating DACA.

As regular plaintiffs in APA proceedings, and as regulators who are defendants in suits challenging administrative action, amici States have an important perspective on the outcome of this petition. Through their experiences as plaintiffs, amici States understand how the probing judicial review contemplated by the APA depends on an agency producing the whole administrative record, especially in cases of informal agency action. And as defendants in suits challenging agency action, amici States are familiar with the burdens of compiling a complete record, which our experiences have shown to be neither unusual nor disproportionate. Moreover, amici States' have a sharpened perspective on the deficiencies in the exact record produced here through participation in the parallel New York suit where petitioners attempt to rely on the same incomplete record.

Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to support respondents' position that mandamus relief is not warranted.

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[2] Proposed Admin. Record, *State of New York*, ECF No. 56-1.

[3] Mem. & Order at 3 (Oct. 19, 2017), *State of New York*, ECF No. 65.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to the mandamus petition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a federal agency may require judicial review to proceed based on an administrative record that it acknowledges does not include all of the responsive, nonprivileged documents that agency decisionmakers actually considered.

2. Whether a federal agency may refuse to document in a log the items it is withholding from an administrative record as assertedly privileged.

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INTERESTS OF AMICI STATES

The amici States—New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the Governor of Colorado, and the District of Columbia—file this brief to protect their interests in preserving meaningful judicial review of federal agency action, and their particular interests in production of the complete administrative record underlying petitioners' decision to terminate the program known as "Deferred Action for Childhood Arrivals" (DACA).

Petitioners seek to reshape the scope of review of agency decisionmaking in a manner that would undermine judicial review in a wide swath of challenges to the outcome of informal agency proceedings. States—including the amici States—are often plaintiffs in Administrative Procedure Act (APA) suits seeking to ensure that federal agencies have acted lawfully and rationally in matters affecting our residents. In that capacity, we depend on the ability of a court to assess whether the agency improperly disregarded any factors or evidence that it should have considered.

As particularly relevant here, the amici States are litigating a parallel challenge to petitioners' termination of DACA where petitioners similarly refuse to provide a complete administrative record that includes, at a minimum, all of the nonprivileged material considered by the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—the decisionmaking agencies that petitioners have identified to the district courts reviewing their termination of DACA.

Amici States also regularly defend challenges to agency actions, and are thus familiar with the burdens of compiling complete records. In our experience, the burdens about which petitioners complain here are neither unusual nor disproportionate.

Under the rule proposed by petitioners, agencies desiring particular outcomes could disregard information contrary to their position, eliminate that information from the administrative record, and thereby insulate their decisions from review for arbitrariness or unlawfulness. The amici States have a pressing interest in ensuring that the federal government remains subject to basic administrative-law principles enabling thorough review of agency action.[1]

STATEMENT

Since the 1960s, DHS and its predecessors have established more than 20 deferred action or similar programs that grant certain protections from removal to large groups of undocumented immigrants in defined categories. *See* U.S. Br. 5, *United States v. Texas* (No. 15-674 (U.S.)), 2016 WL 836758. In June 2012, DHS issued a memorandum establishing one such program, DACA, which allowed certain undocumented individuals brought to the United States as children to request deferred action and work authorization for renewable two-year periods. Pet. App. 47a-51a.

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[1] The parties consent to the filing of this brief. Because this Court's expedited schedule did not permit notice at least ten days before filing, amici States are concurrently filing a motion requesting leave to file this brief.

In 2015, Texas and other States sued to enjoin a different deferred action program (DAPA[2]) as well as certain 2014 changes to the DACA program. *See Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015). That lawsuit did not challenge the original DACA program. After the Fifth Circuit affirmed the grant of a preliminary injunction, finding that the Texas plaintiffs were likely to prevail on certain statutory claims, the United States sought this Court's review and vigorously defended the programs. *See* U.S. Br. 73-76, *Texas* (No. 15-674 (U.S.)). This Court affirmed by an equally divided court. 136 S. Ct. 2271 (2016) (per curiam).

On June 29, 2017, the attorneys general of Texas and other States wrote a letter to Attorney General Jeff Sessions threatening legal challenges against DACA if the program was not rescinded by September 5, 2017. N.D. Cal., No. 17-cv-5211 (*Regents of Univ. of Cal.*), Dkt. No. 64-1, images 238-239 ("Proposed Admin. Record").

On September 5, the Attorney General announced the termination of DACA. *Id.*, Dkt. No. 1-3, image 2. That same day, Acting DHS Secretary Elaine Duke issued a memorandum formally terminating DACA on the basis of perceived litigation risk and citing as justification a one-page letter from the Attorney General. Pet. App. 61a-69a. The Attorney General's letter asserted, with no explanation other than a citation to the Fifth Circuit's decision, that DACA had "the same legal and constitutional defects that courts recognized as to DAPA." Proposed Admin. Record at

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[2] The program's formal name is the "Deferred Action for Parents of Americans and Lawful Permanent Residents."

image 251. In fact, neither the Fifth Circuit nor any other court had ruled on DAPA's constitutionality.

The State of California and other governmental and private plaintiffs sued in the Northern District of California to challenge petitioners' conduct in terminating DACA, asserting claims under the APA and the Constitution. *See* Pet. App. 2a. On October 6, petitioners produced an administrative record comprising fourteen publicly available documents. Pet. App. 5a. The district court ordered completion of the record and production of a privilege log on October 17, explaining that the hand-picked materials Acting Secretary Duke had elected to rely on to support her final decision did not constitute the full record. *See* Pet. App. 8a, 26a-39a. Addressing specific claims of privilege petitioners had cursorily asserted in a partial privilege log, and after viewing certain documents *in camera*, the court determined that some documents had been properly withheld and others should have been produced.[3] Pet. App. 43a.

Petitioners unsuccessfully sought mandamus relief from the Ninth Circuit to avoid these and other discovery obligations. Pet. App. 15a. Petitioners then sought a stay of discovery from the district court, which granted an additional month—until December 22—for petitioners to produce the complete record and privilege log. Pet. App. 45a-46a. Rather than use that

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[3] The court also held that because petitioners proffered a legal reason for terminating DACA, but had failed to provide any meaningful analysis or explanation for that rationale in the decisional documents, petitioners could not rely on attorney-client privilege as a blanket shield to prevent disclosure of materials that would provide the missing reasoning. Pet. App. 37a.

time to detail any specific assertions of privilege, petitioners filed the instant petition.

Similarly, petitioners have contested their obligation to produce a complete record in a suit brought by amici States and other plaintiffs challenging the termination of DACA in the Eastern District of New York. *See* States' First Am. Compl., *State of New York v. Trump*, No. 17-cv-5228 (E.D.N.Y.), ECF Nos. 54 & 55. Petitioners submitted the same sparse proposed record as here, and accordingly, the New York court ordered petitioners to complete the record and submit a privilege log. Mem. & Order at 3 (Oct. 19, 2017), *State of New York*, ECF No. 65. Rather than doing so, petitioners filed a mandamus petition that is currently pending before the Second Circuit, which has stayed discovery. *See* Order, *In re Duke*, No. 17-3345 (2d Cir. Oct. 24, 2017), ECF No. 41. In the New York litigation, no claims of privilege have been presented to any court for decision.

SUMMARY OF ARGUMENT

The district court here followed well-established principles when directing petitioners to complete a deficient administrative record compiled based on an incorrect legal standard. Petitioners' production of only those documents they have decided to rely on in supporting the final agency decision—rather than the documents that were actually before the agency decisionmakers here—does not meet their obligation under the APA to produce the whole administrative record. The district court's direction to complete the administrative record thus cannot constitute the kind of egregious error warranting the extraordinary writ of mandamus. Nor can the district court's routine

decision to require petitioners to document assertions of privilege in a log constitute grounds for mandamus relief.

This Court should reject petitioners' attempt to use mandamus as a vehicle to reshape basic tenets of administrative law. The consequence of accepting petitioners' arguments would be a dramatic curtailment of the probing judicial review of administrative action that the APA contemplates, and that courts have applied for decades.

ARGUMENT

I. THE DISTRICT COURT'S ORDER TO PRODUCE THE WHOLE ADMINISTRATIVE RECORD APPLIED SETTLED LEGAL PRINCIPLES AND CANNOT JUSTIFY MANDAMUS.

A. The Determination of What to Include in an Administrative Record Is Not Left to an Agency's Unreviewable Discretion.

Petitioners urge this Court to accept the unprecedented and dangerous position that an agency producing an administrative record for judicial review of the outcome of an informal agency proceeding may present only those items on which it chooses to rest its decision, rather than a complete record of the materials that were actually before the agency; and that the reviewing court has no power to compel completion of that partial, sanitized, and potentially biased record. *See, e.g.*, Pet. 21; Stay 24; Stay Reply 4. This approach would vitiate the "thorough, probing, in-depth review" of agency action contemplated by the APA. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Without the complete administrative record, a reviewing court cannot assess whether the agency considered all "relevant factors," "failed to consider an "important aspect of the problem," or resolved disputed issues in a way that "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). Accepting petitioners' position would thus seriously harm the ability of courts to ensure that federal agencies act lawfully and rationally, including in matters affecting the amici States and their residents.

To enable meaningful review, the APA requires that a federal agency produce "the full administrative record that was before the [decisionmaker] at the time he made his decision." *Overton Park*, 401 U.S. at 419 (discussing 5 U.S.C. § 706). The "whole record" includes not only the "evidence supporting" an agency's ultimate determination, but also the materials that "fairly detract[]" from that position. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Courts regularly police whether an agency has met its obligation to produce a complete record and have routinely rejected agencies' attempts to proceed on less than the entire record.[4] For example, in *Overton Park*, when confronted with a set of documents that "clearly d[id] not constitute the 'whole record' compiled by the agency," this Court remanded to the district court for review based on a record including those documents.[5] 401 U.S. at 420.

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[4] *See* cases discussed *infra* at 9-10.

[5] The Court also noted that if the completed administrative record did not "disclose the factors that were considered or the

Indeed, petitioners have not identified a single appellate decision supporting the view that a reviewing court is confined to the administrative record an agency decides to present even if that record is demonstrably incomplete. The decisions from this Court on which petitioners rely merely affirm that the APA touchstone for evaluating agency action is the set of materials actually before the agency at the time the agency made its decision.

In *Florida Power & Light Co. v. Lorion*, the Court explained that judicial review of agency decision-making should presumptively proceed on the record compiled "in the course of informal agency action," as opposed to a record created through de novo factfinding by a district court." 470 U.S. 729, 743-44 (1985). There was no dispute that the record "already in existence" and "present[ed] to the reviewing court" was that complete record. *Id.* at 744. Similarly, in *Camp v. Pitts*, all parties agreed that the agency had placed the "entire administrative record already in existence" before the reviewing court. 411 U.S. 138, 142 (1973) (per curiam). Petitioners are thus wrong to read *Florida Power* and *Camp* as suggesting that an agency has discretion to submit less than the complete

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Secretary's construction of the evidence," it could be necessary—upon a showing of impropriety or bad faith—for the District Court to take some additional evidence, such as testimony from agency officials. *Overton Park*, 401 U.S. at 420. The Court thus recognized that requiring a complete administrative record is different from requiring supplementation or expansion of an administrative record with materials not before the agency at the time of the decision. Petitioners' are wrong to conflate (Pet. 20) those separate inquiries and standards.

record of documents before the agency decision-makers.

Appellate courts have uniformly rejected that position as inconsistent with the APA's requirements for judicial review.[6] As the D.C. Circuit has explained, allowing an agency to selectively omit parts of the record would permit the agency to insulate its decisions by "withhold[ing] evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). "For review to go forward on a partial record," a reviewing court "would have to be convinced that the selection of particular portions of the record was the result of mutual agreement between the parties *after both sides had fully reviewed the complete record*." *Id.* at 793 (emphasis added). Anything else would be "fundamentally unfair" to an APA plaintiff. *Id.* This is because, in light of the "asymmetry in information" between the plaintiff and the agency, there would otherwise "be no check upon the failure of the agency to disclose information adverse to it." *Id.* Put another way, in the context of an APA challenge to informal agency action, "the normal pressures towards inclusion of all relevant material in the record before the court are absent." *Id.* Thus, a court must endeavor to "obtain the full administrative record" before deciding the claim. *Id.* at 792.

Similarly, the Second Circuit has held that where APA plaintiffs dispute the completeness of the administrative record produced by the agency, a court should not decide the case without first verifying that

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[6] Because petitioners are incorrect (*see* Pet. 17) that there is any conflict in appellate precedent on the issues raised in this proceeding, their alternative request for a writ of certiorari should be denied.

the record is complete. *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). The court reasoned that "[d]etermining what constitutes an agency's informational base is vital": just because "defendants presented documents that seemed to support the rationality of their actions does not mean that the same conclusion would have been reached if the Court had been aware of other information that was before the agency." *Id.* Thus, a court should not proceed to summary judgment on a disputed record before assessing "whether some portions of the full record were not supplied." *Id.* And an agency's claim to "have submitted the full record will not substitute for [a court's] independent consideration of that issue." *Id.*

The other circuits to have addressed the issue have reached the same result. For example, the Ninth Circuit has permitted discovery where APA plaintiffs plausibly allege that an agency has not presented the reviewing court with the "full administrative record," but rather has relied on documents or materials not included in the proffered record. *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.); *see also Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (explaining that the "whole administrative record . . . is not necessarily those documents that the *agency* has compiled and submitted" (quotation marks omitted)). The Tenth Circuit has similarly observed that an agency "may not unilaterally determine what constitutes the Administrative Record." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

As these courts have recognized, petitioners are wrong in contending (Pet. 25) that no external check is required because an "agency bears the risk of an insufficient record." By omitting material that does

not support its decision, the agency prevents APA plaintiffs from challenging the agency's response to adverse material.

It is a long-standing and central tenet of APA review that a court must assess not only the evidence justifying an agency's conclusion, but also all of the "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487-88. Without such information, a court cannot consider whether "the agency has made a reasoned decision based on its evaluation of the significance" of all available information. *See Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 378 (1989).

If given unilateral power to withhold adverse facts, studies, or analyses in their possession, agencies could make it impossible for a reviewing court to identify flaws in their reasoning or conclusions. And that would seriously impair ability of States—including the amici States—to obtain the judicial review that is a critical part of the mechanism designed by Congress to hold federal agencies accountable to their co-sovereigns and to the public.[7]

Petitioners' assertions about the burdens of producing a complete administrative record establish no grounds for circumventing the well-established scope of APA record review. In our capacity as defendants in challenges to agency action, the States—

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[7] States regularly challenge the rules, regulations, and policies promulgated by federal agencies, playing a critical role in checking agencies on issues of major public importance under administrations of both political parties. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

including amici States—well understand that administrative records are often large and take time and effort to compile. Indeed, agency decisions involving significant questions of law and policy may require consideration of complex technical, environmental, or scientific information, and records may potentially include tens-of-thousands, hundreds-of-thousands, or millions of documents or pages.[8] The records in such cases are large precisely because the issues are important, or complicated, or both.

In this case, for example, the termination of DACA will have dramatic consequences for approximately 800,000 DACA recipients, as well as their families, communities, and employers—including amici States. Any decision to terminate DACA in an "orderly" manner (Pet. App. 67a) would have to take account of, among other things, the likely consequences of particular methods of ending a program that had engendered such significant reliance interests. Meaningful judicial review of such a decision requires that a reviewing court have access to the same items considered by the agency.

Petitioners are wrong in suggesting that the nature of the informal decisionmaking process they have selected here vests them with "more latitude" (Pet. 29) to tailor a record of their choosing. In formal agency adjudications, where the record is defined by

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[8] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (per curiam); *Hyatt v. United States Patent & Trademark Office*, 146 F. Supp. 3d 771, 774 (E.D. Va. 2015); *Klamath-Siskiyou Wildlands Ctr. v. National Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1044 (N.D. Cal. 2015).

statute,[9] interested parties may call and cross-examine witnesses, the proceedings must be transcribed, and the agency may not take evidence through ex parte communications.[10] And in informal adjudications and informal rulemaking, federal law provides mechanisms for interested persons to place information and arguments before the agency and into the record.[11] But in an informal decisionmaking process like the one used here, there are no formal safeguards, nor even any defined opportunity for interested persons to submit argument or information. In such a case, it is even more critical that reviewing courts understand what constitutes the agency's informational base so that they may assess "whether some portions of the full record were not supplied," *Dopico*, 687 F.2d at 654. Otherwise, the court would not be equipped to evaluate whether the agency considered all of the "relevant factors," or whether the agency's ultimate conclusion "runs counter to the evidence before the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 42-43.

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[9] The record in a formal adjudicative proceeding consists of "[t]he transcript of testimony and exhibits, together with all the papers and requests filed in the proceeding." 5 U.S.C. § 556(e).

[10] *See* 5 U.S.C. § 556(d) (right to cross-examine); *id.* § 556(e) (transcribed hearings); *id.* § 557(d)(1)(A) (barring ex parte communications).

[11] *See* 5 U.S.C. § 553(c) (allowing interested persons to submit "written data, views, or arguments" in informal rulemaking proceedings); *id.* § 554(c)(1) (similar provision for informal adjudications).

B. Petitioners Had No Right—Much Less a Clear and Indisputable Right—to Resist Completing the Record and Producing a Privilege Log.

Applying settled law, the district court required petitioners to complete the administrative record and produce a log to document any basis for withholding materials that would otherwise be within the administrative record. It properly rejected petitioners' assertions that they need not provide the documents that were actually before the agency decisionmakers, and may instead hand-pick a record based on a unilateral determination of "what materials are relevant to [an agency's] decision and on what basis it is willing to defend its actions." Stay Reply 4. Mandamus is not available here to avoid the obligations set by the district court.

Before a writ of mandamus will issue, petitioners must establish, inter alia, a "'clear and indisputable'" right to the relief sought. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (quoting *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)). Under existing law and longstanding practice, and in light of the record they have submitted and their own statements characterizing what they have produced, petitioners cannot establish any right—much less a clear and indisputable right—to avoid producing a complete administrative record and a privilege log.

1. Petitioners' statements show that they have not produced a complete record.

Petitioners have provided shifting descriptions of the record that they have produced, advising this Court now that they have produced "all non-

deliberative materials compiled and considered by the Acting Secretary in reaching her decision." Pet. 7. But petitioners' own admissions show that they have not in fact submitted all responsive, nonprivileged documents that were actually considered by the Acting Secretary of DHS—although such documents are certainly part of the complete administrative record. Petitioners admit, for example, that the Acting Secretary personally viewed several articles of media commentary addressing DACA that, although not privileged in part, were not included in the record. Pet. App. 36a. Moreover, petitioners admit that they have identified numerous other responsive, nonprivileged documents that were before the agency and bear on the termination of DACA, but are not in the record they presented. Stay Add. 23, 33. Petitioners thus have no clear and indisputable right to a writ of mandamus relieving them of their obligations to provide additional documents to the district court.

As this Court has explained, APA review encompasses consideration of whether the agency arbitrarily disregarded any items it should have considered, and this is no less true where a "legal and policy" determination (*see* Stay Reply 1) is concerned. *See Judulang v. Holder*, 565 U.S. 42, 58 (2011). For example, when an agency changes its position on a policy matter, there may be "serious reliance interests that must be taken into account," such that "[i]t would be arbitrary or capricious to ignore such matters." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Perhaps for this reason, DOJ's long-standing past guidance to federal agencies on compiling the administrative record—withdrawn concurrently with petitioners' attempt to seek mandamus review from

the Ninth Circuit—directed that the record should encompass "documents that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final decisionmaker."[12] Similarly, appellate courts have explained that a record is incomplete if it does not include "all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches*, 994 F.2d at 739; *accord Thompson*, 885 F.2d at 555.

As DOJ and these courts understood, a record that allows for meaningful review must include the documents developed "throughout the agency review process," including by the final decisionmaker's top subordinates. *Bar MK Ranches*, 994 F.2d at 739. When an agency considers a complex issue, the chief decisionmaker typically will not "wade through the entire record personally," but will "delegate detailed consideration of the administrative record to [her] subordinates while retaining the final power of decision." *National Small Shipments Traffic Conf., Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1450 (D.C. Cir. 1984).[13] Accordingly, the materials

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[12] U.S. DOJ, Env't & Natural Resources Div., Guidance to Federal Agencies on Compiling the Administrative Record 2 (Jan. 1999) (internet); *accord* U.S. Dep't of the Interior, Standardized Guidance on Compiling a Decision File and Administrative Record 5 (June 27, 2006) (internet); U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Guidelines for Compiling an Administrative Record 4 (Dec. 21, 2012) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[13] *See also National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (documents are part of record if they "might have influenced the agency's decision"); *accord Bethlehem Steel Corp. v. United States*

reviewed by subordinates will often constitute the informational base that drives the agency's decisional process, and therefore must be part of the administrative record. Allowing an agency to exclude such materials would prevent reviewing courts from meaningfully testing the rationality of agency decisionmaking, and undermine the ability of APA plaintiffs—including amici States—to use APA review as a counterweight against arbitrary exercises of federal power.

The district court thus committed no error, let alone any mandamus-worthy error, in concluding that the subset of documents provided does not comprise the whole administrative record. By petitioners' own admission, that set of documents excludes materials before Acting Secretary Duke pertaining to the termination of DACA that she chose not to "focus on" when "making her decision."[14] It also excludes the

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Envtl. Prot. Agency, 638 F.2d 994, 1000 (7th Cir. 1980) (quoting *National Courier*); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1993) (administrative record includes any document that was "before the agency pertaining to the merits of its decision"); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (administrative record includes document that "contained information germane to the decision and not duplicated elsewhere in the record").

[14] Letter from Dep't of Justice to Magistrate Judge 8 (Oct. 16, 2017), *Batalla Vidal v. Baran*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 85. Petitioners' justification for that exclusion highlights their disregard of the proper legal standard. As they have asserted: "Plaintiffs may wish that the Acting Secretary had considered" a particular letter she received when "making her decision, but her focus on other documents is the reason it was not included." *Id. But see Judulang*, 565 U.S. at 58.

documents considered and developed during DHS's review process. Indeed, in their declarations to this Court, petitioners admit that they have identified a number of responsive, nonprivileged records considered by DHS that are not in the record produced to the district court. Stay Add. 23, 33. And although petitioners have identified AG Sessions as a joint decisionmaker in terminating DACA,[15] the record excludes all documents before the Attorney General at the time of the challenged decision.

Petitioners' hand-picked administrative record also includes no materials detailing the consideration of "the risks" of "litigation" that petitioners offer as a central rationale for their decision. *See* Stay Reply 1. Such materials would show, for example, how petitioners determined that terminating a program of crucial importance to hundreds of thousands of individuals and employers throughout the country would result in fewer litigation burdens than defending the program against a single challenge brought in a single court.[16] And it would include some explanation of the reasons for Attorney General Sessions's determination that DACA is unconstitutional—a dramatic reversal in position for DOJ, which has previously identified abundant legal authority supporting DACA and related programs, including in

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[15] *See* Mem. & Order on Mot. to Dismiss (Nov. 9, 2017), *Batalla Vidal*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 104.

[16] The Attorney General has suggested he may have had out-of-court communications with Texas concerning the termination of DACA. *Hr'g on Oversight of the Justice Department, before S. Comm. on Judiciary*, Video 1:33:44 (Oct. 18, 2017) (internet) (unofficial transcript at 2017 WL 4677754). Any such communications were likely central to an assessment of litigation risk and should be made part of the administrative record.

a 2014 opinion from the Office of Legal Counsel and in 2016 briefs to this Court.

2. Petitioners have no right to avoid listing assertedly privileged documents in a log.

It is standard practice that where a litigant asserts that privilege doctrines justify its withholding of documents germane to the litigation—as DHS and DOJ do here—a court may direct the production of "an adequately detailed privilege log" in order "[t]o facilitate its determination" of that issue.[17] *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (quotation marks omitted). This is equally true where the litigant is an agency, and the legal claims implicated by the document arise under the APA. Indeed, the ordinary practice of various federal agencies refutes petitioners' suggestion (Pet. 30) that producing a privilege log in an APA case is either unusual or excessively "onerous."

Guidance issued by the Department of the Interior in 2006 instructs that agency to create and file "a privilege index" with an administrative record, identifying "the nature of any privilege" asserted. U.S. Dep't of the Interior Guidance, *supra*, at 12-13. A 2012 guidance document issued by a division of the Department of Commerce recognizes that "[d]ocuments on the Privilege Log are considered part of the

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[17] Here, for example, a privilege log would permit the district court to test the Attorney General's suggestion that any communications with Texas—the entity threatening litigation against the Attorney General—on his decision to rescind DACA are privileged work-product and thus need not be disclosed. *Hr'g on Oversight of the Justice Department*, *supra*, n.16.

Administrative Record," and should be provided to the court and parties to allow resolution of "any disputes about whether such documents must be made available." U.S. Dep't of Commerce, Guidelines, *supra*, at 14. And the just-rescinded guidance document that DOJ issued to federal agencies in 1999 provided that where "the administrative record includes privileged documents and materials," an "index of record must identify the documents and materials . . . and state on what basis they are being withheld." DOJ Guidance, *supra*, at 4.

Petitioners identify no authority for the proposition that a court lacks the power to require an indexing of the supposedly privileged documents withheld from an administrative record. Although they cite (*see* Pet. 27-28) the decision in *San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission*, that case concerned whether the court was "warranted in examining the deliberative proceedings of the agency," not whether the agency could refuse to document assertions of privilege in a log. 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc). The government did not claim, and the court did not uphold, the right to refuse to identify assertedly privileged documents. *Id.* at 44.

A blanket rule that agencies need not produce privilege logs would undermine the statutory scheme that provides for judicial review as a means of holding federal agencies accountable. If there were no possibility that a court might scrutinize a claim of privilege, agencies would have a strong incentive to make overbroad assertions of privilege, denying courts the materials needed for meaningful judicial review and impairing the rights of challengers.

Petitioners assert that they need not produce a privilege log because all the documents that they seek to exclude are "categorically outside the administrative record." Pet. 30. But this argument is circular: the withheld documents are outside the record only if they are in fact privileged, claims of privilege are subject to judicial review, and courts cannot test a claim of privilege without a log identifying the documents asserted to be privileged.[18] Accordingly, petitioners cannot show that the district court committed any error in ordering a privilege log—much less a "clear and indisputable" error. *See Hollingsworth*, 558 U.S. at 190.

II. THE DISTRICT COURT HAS NOT AT THIS POINT TAKEN ANY ACTION THAT COULD SERVE AS A PREDICATE FOR MANDAMUS RELIEF.

To obtain the extraordinary remedy of mandamus, petitioners must show a "clear abuse of discretion or conduct amounting to usurpation of the judicial power." *Mallard v. United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989) (quotation and alteration marks and citations omitted). As repeat litigants against federal agencies, the States—including amici States—have a strong interest in ensuring that such agencies cannot use mandamus relief to circumvent the initial reviewing court's

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[18] If some limited class of documents is subject to a categorical privilege, as petitioners suggest (Pet. 31-32), the appropriate remedy is not the broad mandamus relief that petitioners seek, but a more tailored ruling that petitioners may assert privilege categorically for that set of materials. Petitioners' own admissions (*see* Stay Add. 23, 33) establish that they are aware of many responsive documents that are not subject to any such categorical and unqualified privilege.

consideration of privilege claims. Mandamus is a remedy "reserved for really extraordinary causes," *Dolan v. United States*, 560 U.S. 605, 628 (2010) (quotation marks omitted), not APA record disputes that lower courts are best equipped to address in the first instance.

Here, petitioners assert that they had to file a mandamus petition because they have had no "opportunity to perfect" their "invocations of privilege" of the documents they listed on an initial, partial privilege log. Stay Reply 13. But they have had nearly two months since the district court found, based on *in camera* review, that thirty-five logged documents should be included as part of the record. Moreover, after the Ninth Circuit denied mandamus relief, the district court provided petitioners with an additional month before any further documents or logs need be produced. Petitioners could have used that time to file a motion for reconsideration or for a protective order in which they could have explained, for the first time, the in-depth factual and legal bases for why they believed the documents at issue were privileged. Instead they filed the instant petition.

Though petitioners have taken the first step of producing a log, they have not yet taken the further steps necessary to substantiate a valid claim of privilege. For example, to assert that a document is protected from disclosure as deliberative, an agency supervisor who personally considered the information must offer a "detailed specification of the information for which the privileged is claimed." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). But rather than develop any specific claim before the district court, as they could have done, petitioners have elected to preempt the district court's document-by-document

analysis by filing a mandamus petition that challenges overarching principles of administrative review.

The district court cannot have committed a clear abuse of discretion or usurpation of power, *see Mallard*, 490 U.S. at 309, with respect to issues that have not yet been squarely raised or fully presented for its consideration. Indeed, to date, petitioners have identified only one document that is asserted to be within the Executive privilege,[19] and have identified that document only to this Court. Privilege issues relating to that document—alleged to be a memorandum from White House Counsel to the President (*see* Pet. 31-32)—should be presented with specificity to the district court in the first instance. This Court should not presume that the district court will fail to give appropriate weight to valid claims of privilege, or that it will erroneously reject claims of privilege that are detailed in briefing. Because the district court cannot have clearly abused its discretion before it has had a meaningful opportunity to exercise such discretion, this Court should deny petitioners' request for mandamus relief.

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[19] Petitioners also argue (Pet. 22) that the district court improperly allowed discovery of materials from the White House before ruling on a threshold motion to dismiss. But for the reasons explained in the New York action, petitioners' threshold justiciability and jurisdictional arguments are inconsistent with this Court's precedents. *See* Mem. & Order (Nov. 9, 2017), *Batalla Vidal*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 104.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for mandamus and petitioners' alternative request for certiorari.

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December 2017

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